IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

NOTICE OF MOTION NO.346 OF 2004

IN

WRIT PETITION NO.1063 OF 2003

Mr.Dhillon P. Shah & anr. ..Petitioners.

Vs.

The Greater Bombay Co-operative

Bank Ltd. & Ors. ..Respondents.

WITH

NOTICE OF MOTION NO.116 OF 2005

IN

WRIT PETITION NO.1063 OF 2003

Shivangi D. Shah & anr. ..Petitioners.

Vs.

The Greater Bombay Co-operative

Bank Ltd. & Ors. ..Respondents.

....

Mr.A.A.Joshi for the Applicants.

Mr.V.R.Walawalkar with Mr.S.A.Bhalekar for

Respondent Nos.1 and 3.

Mr.Arvind Rathod with Ms.Sushma Kadam for

Respondent No.5.

Mr.Milind More, AGP for the State.

CORAM : DR.D.Y.CHANDRACHUD, J.

6th April, 2005.

P.C. :

1. The Writ Petition has been admitted on 30th April, 2003. The relief which has been claimed in the Petition is for quashing and setting aside notices dated 22nd February, 2003 and 17th March, 2003 by which possession was demanded of certain immovable property in pursuance of an auction which was conducted in October 2002 and for setting aside the execution process that was commenced in pursuance of a recovery certificate dated 30th August, 2001. A writ has been sought against the First Respondent - Bank from proceeding with the hearing of the applications filed before the Special Recovery Officer. This order will dispose of two Notices of Motion (i) Notice of Motion 346 of 2004 in which the relief that has been prayed for is an order to the effect that the sale conducted by the Bank in favour of the First Respondent be declared as null, void and nonest and (ii) Notice of Motion 116 of 2004 in which the relief that is sought is for a direction to the Bank to restore the possession of the immovable

property to the Petitioners.

2. On 30th August, 2001 a recovery certificate under Section 101 of the Maharashtra Co-operative Societies Act, 1960 was issued in favour of the First Respondent by the Assistant Registrar of Co-operative Societies. A revision filed by the Petitioners was dismissed by the Divisional Joint Registrar. Thereafter a petition was filed before this Court (Writ Petition 26 of 2002) challenging the order of the revisional authority which was admitted on 12th February, 2002 subject to a condition of deposit of an amount of Rs.1 crore. The conditional order was modified in appeal by the Division Bench on 23rd April, 2002 and the modified condition was that there shall be a deposit of Rs.50 lacs, failing which the petition shall stand dismissed. No amount was deposited in compliance with the order of the Division Bench, consequent upon which the petition stands dismissed. The recovery certificate has, therefore, attained finality.

3. On 26th July, 2002 a proclamation of sale came to be issued in pursuance of which on 22nd

February, 2003 and 17th March, 2003 notices came to be issued to the Petitioners. The Petitioners challenged those notices in a writ petition before this Court (Writ Petition 1063 of 2003) and while admitting the petition this Court gave liberty to the First Respondent by an order dated 30th April, 2003 to issue a fresh proclamation of sale. A proclamation of sale was thereupon issued on 17th May, 2003 in respect of the property by the name of Saket Bunglow and a flat bearing No.12/5 at Gopal Bhuvan at Vile Parle (West). A public notice was issued in the newspapers on 23rd June, 2003 inviting bids for the sale of the said properties and bids were opened on 29th June, 2003. The highest bid was in the amount of Rs.1.51 Crore. The Petitioners had moved a Motion (Notice of Motion 284 of 2003) on 27th June, 2003 challenging the notices of sale and that Motion came to be dismissed by a Learned Single Judge of this Court on 14th July, 2003. In the meantime, the cheque which was deposited by the highest bidder was dishonoured. On 7th July, 2003, the Fifth Respondent who was one of the bidders in the fray submitted an enhanced bid in the amount of Rs.1.60 Crores and his bid was submitted together with an

earnest money deposit of Rs.24 lacs.

4. On 21st July, 2003 the Petitioners filed objections under Rule 107(14) of the Maharashtra Co-operative Societies Rules, 1960 before the Special Recovery Officer on the ground that there was a fraud and material irregularity in the sale. On 22nd July, 2003 the Petitioners filed a revision application, a copy whereof was served on the Bank and the Divisional Joint Registrar granted an order of status quo on 23rd July, 2003. The Bank thereupon filed a writ petition before this Court (Writ Petition 5244 of 2003) challenging the order of the Divisional Joint Registrar which was allowed by a judgment and order of a Learned Single Judge dated 3rd October, 2003. Against the order of the Learned Single Judge a Letters Patent Appeal was filed on 7th October, 2003. It is common ground that on 21st November, 2003 the Division Bench called for the records of the auction sale and issued a direction to implead the auction purchaser. The auction purchaser was impleaded on 3rd December, 2003 and again it is common ground that on 4th December, 2003 the record was produced before the Division Bench and the inspection of the

record was granted to the Petitioners on 6th December, 2003. On 8th January, 2004 the Division Bench while admitting the Letters Patent Appeal passed a conditional order on the civil application for interim relief by which the Petitioners were directed to deposit a sum of Rs.50 lacs within a period of 12 weeks failing which the interim order was to stand vacated. The period of deposit was extended subsequently to 30th April, 2004. The Petitioners deposited a cheque in compliance with the order of the Division Bench. But, it is common ground that the cheque was dishonoured.

5. The matter was thereafter placed before the Division Bench on 2nd July, 2004. The Division Bench consisting of Mr. Justice A.P.Shah and Mr. Justice S.U.Kamdar held that the Petitioners had abused the process of the Court. Consequently, the Civil Application was dismissed with costs quantified at Rs.25,000/- and the Special Recovery Officer was directed to take necessary steps pursuant to the auction sale if necessary with police assistance. After the order of the Division Bench dated 2nd July, 2004 a fresh Notice of Motion (Notice of Motion 346 of 2004) was moved before

this Court on 13th July, 2004 in which the relief which has been sought has been adverted to earlier. The relief sought is an order to the effect that the sale in favour of the Fifth Respondent be declared as null, void and nonest. When the Motion was moved before Mr. Justice F.I.Rebello on 1st October, 2004 the learned Judge was of the view that any order that would be passed by this Court on the Motion may be in conflict with the order of the Appellate Bench which had specifically directed the Special Recovery Officer to take necessary steps in pursuance of the auction sale, if necessary with police assistance. In order to enable the Petitioners to move the Division Bench for clarification a direction was issued that the sale should not be completed for a period of four weeks. Upon the expiry of four weeks the ad interim order was continued on 29th October, 2004 since the matter was not placed before the Division Bench which had passed the earlier order. The Division Bench by an order dated 22nd February, 2005 was of the view that the order dated 2nd July, 2004 is clear and that no clarification was necessary. The prayer for clarification was rejected. It may be noted that on 1st October,

2004 the Learned Single Judge while granting relief, recorded the Motion as having been disposed of, but that has since been clarified on 14th March, 2004 as a direction that the Motion is adjourned for a period of four weeks. That is how both the Motions have been placed before me for hearing. Affidavits have been filed in reply to the Motions and the learned counsel have been heard at quite some length.

6. Two submissions have been urged before the Court in support of the Motion; (i) That under Rule 107(11) the Fifth Respondent as the auction purchaser was duty bound to deposit 50% of the sale price at the time of the purchase and the balance within a period of 15 days thereafter. The auction purchaser having failed to do so, the sale that has taken place in favour of the auction purchaser must be held to be a nullity and the Bank must therefore readvertise the property for sale and (ii) That the Bank had taken possession on 25th February, 2005 in violation of the ad interim order of the Learned Single Judge dated 29th October, 2004 and consequently, it must be directed to restore possession back to the Petitioners since the act of

taking over possession was in breach of an injunction granted by this Court.

7. In so far as the prayer in Notice of Motion 346 of 2004 is concerned, the relief which has been sought at the interim stage is for a direction that the sale which has been conducted in favour of the Fifth Respondent must be declared to be invalid and nonest. I am of the view that it would be neither appropriate nor proper to grant any such final declaration at the interim stage during the pendency of the Petition. What the Motion really seeks before the Court is for an order of final adjudication during the pendency of the Petition to the effect that the sale is invalid and nonest. Such relief cannot be granted at the interim stage and must await the final hearing of the Petition. That apart, judicial discipline requires the Court to be cognizant of the circumstance that the facts which form the foundation of Notice of Motion 346 of 2004 were before the Division Bench when it passed its order dated 2nd July, 2004. Both the Learned Single Judge whose order dated 3rd October, 2003 was carried in appeal and the Division Bench in the order dated 2nd July, 2004 came to the

conclusion that the Petitioners were guilty of an abuse of process. It is common ground between the learned counsel that the record of the auction proceedings was produced before the Division Bench. But quite apart from this, on 2nd July, 2004 the Division Bench issued specific directions to the Special Recovery Officer to take necessary steps in pursuance of the auction sale with police assistance. Mr. Justice F.I.Rebello was of the view that any order passed in the Motion would conflict with this direction of the Division Bench and therefore, liberty was granted to the Petitioners to move the Division Bench for clarification. The Division Bench has held on 22nd February, 2005 that no clarification was necessary of the order dated 2nd July, 2004. The intendment of the order dated 2nd July, 2004 is clear. The Division Bench has directed the Special Recovery Officer to take necessary steps in pursuance of the auction sale if necessary with police assistance. Possession was taken on 25th February, 2005 after the order of the Division Bench with the aid of police assistance. At this stage, having regard to the aforesaid background, it would be in the very nature of things impermissible for a Single Judge

of this Court to issue directions of a nature that would clearly conflict with the order of the Division Bench. This is clearly impermissible. Least of all should the Court exercise its jurisdiction in aid of a party whose conduct shows and has been found to be an abuse of judicial process. The jurisdiction under Article 226 is a jurisdiction in aid of justice. There is no merit in the contention also that possession was taken in breach of the order of the Learned Single Judge. The Learned Single Judge in his order dated 1st October, 2004 had granted liberty to the Petitioners to move the Division Bench for a clarification and it is clear that for a period of four weeks the Bank was directed not to complete the sale process so as to "enable the Petitioners to take appropriate steps". The subsequent extension of that direction on 29th October, 2004 must, therefore, mean that until the Division Bench took up the application for clarification, the Bank ought not to take steps to complete the auction sale. The sale was concluded and possession was taken after the Division Bench held on 22nd February, 2005 that the earlier order was clear in itself and warranted no clarification. The Court

is informed that the balance has been paid on 16th March, 2005 and a sale certificate has been issued. At this stage, during the pendency of the Petition, the interim orders which are sought in the Notices of Motion cannot be granted. A final adjudication must await the result of the Petition. There is, therefore, no merit in the Notices of Motion which are accordingly rejected. Since the Motions have been disposed of, the ad interim order shall stand vacated.